



REPUBLIC OF KENYA



KENYA LAW
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**Mariga & 2 others v Mariga & another (Civil Appeal (Application)
E050 of 2024) [2024] KECA 920 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 920 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) E050 OF 2024
WK KORIR, JA
JULY 26, 2024**

BETWEEN

ANN WANGECI MARIGA 1ST APPLICANT

IBRAHIM THOMAS MARIGA 2ND APPLICANT

ISAAC KIMANI MARIGA 3RD APPLICANT

AND

MARGARET WANJIRU MARIGA 1ST RESPONDENT

MARY WANJIKU MARIGA 2ND RESPONDENT

*(Being an application for leave to file a Notice of Appeal out of time against
the judgment and decree of the High Court at Nakuru (R. Ngetich, J)
issued and dated 20th December 2022 in Succession Cause No. 14 OF 2019)*

RULING

1. The applicants through the notice of motion dated 17th May 2024 brought pursuant to sections 3A, 3B and 7 of the [Appellate Jurisdiction Act](#) and rules 4 and 77 of the [Court of Appeal Rules](#) 2022 seek enlargement of time for filing and serving a notice of appeal against the judgment delivered on 20th December 2022 by R. Ngetich, J. in Nakuru High Court Succession Cause No. 14 of 2019. They also pray that the notice of appeal dated 9th May 2024 be deemed duly filed and that all other activities consequent to the lodging of the notice of appeal be in accordance with the rules of the Court. The application is based on the grounds on its face and the averments in the affidavit sworn in support of the application.
2. It is the applicants' case that although they were parties in Nakuru High Court Succession Cause No. 14 of 2019, the judgment they intend to appeal against was delivered on 20th December 2022 without notice and in their absence. It is their averment that when they became aware of the judgment on 9th



March 2023 they instructed their counsel on record to file an appeal against the impugned judgment. The applicants also depose that their application dated 17th March 2023 serialized as Nakuru Court of Appeal Application No. E026 of 2023 seeking enlargement of time to file a notice of appeal was struck out on 26th April 2024 as it was brought under the wrong law.

3. The applicants state that they are desirous of pursuing an appeal and that the instant application has been brought without delay. Further, that the delay in filing the present application was due to the earlier application being struck out because of a bona fide mistake on the part of their then counsel and that mistake should not be visited upon them. They further aver that the intended appeal raises serious issues of law and fact. According to the applicants, it is in the interest of justice that their intended appeal be heard and that the respondents will not be prejudiced if time is enlarged.
4. Despite being served with the case management directions and the application, the respondents did not file any response.
5. Through the submissions dated 6th June 2024, counsel for the applicant referred to the case of *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR to point out the prerequisites for enlargement of time. Counsel pointed out that the original delay period was of two months and that such a period is not inordinate and is excusable. Counsel urged the Court to adopt the rationale in *Zacheaus Omia Juma v. Nicholas Kirangi* [2021] eKLR where a delay of 9 months was excused. Counsel also submitted that the delay was as a result of the failure by the High Court to inform the applicants of the delivery of the judgment and the subsequent dismissal of the applicants' application for extension of time for being hinged on the wrong provisions of the law. Counsel submitted that the respondents have not stated any prejudice they would suffer should the application be allowed and that on the contrary, disallowing the application would deny the applicants an opportunity to ventilate their grievances before the Court. Counsel ultimately urged that the motion should be allowed as it is in the interest of justice to grant the applicants an opportunity to ventilate their grievances within the available ranks of the judicial system.
6. Having carefully considered the applicants' pleadings and submissions, I isolate the main issue for determination to be whether the applicants have satisfied the conditions for extension of time pursuant to rule 4 of the *Court of Appeal Rules*, 2022. The basis upon which the discretion to enlarge time is exercised was expressed in *Paul Wanjobi Mathenge v. Duncan Gichane Mathenge* [2013] eKLR as follows:

“The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance...”
7. Based on the cited decision, it is apparent that this application will be dispensed by determining whether the applicants have tendered sufficient reasons for not filing their notice of appeal within the stipulated time and whether the respondents will suffer any prejudice should the application be allowed.
8. Pursuant to the provisions of rules 3(e) and 77(2) of the *Court of Appeal Rules*, 2022, and considering that the judgment was delivered on 20th December 2022, the notice of appeal ought to have been filed by 26th January 2023. The present application is however dated 17th May 2024 and the period of delay is about 15 months. The applicants contend that, first, they were not aware of the delivery of



the impugned judgment as it was delivered without notice. Secondly, they assert that they made an initial application dated 30th March 2023 which was filed about two months after the delivery of the impugned judgment. It is also a matter of fact that the initial application dated 30th March 2023 was struck out by the Court vide a ruling dated 26th April 2024 on the main ground that it was premised on the wrong provisions of the law.

9. Considering the above undisputed facts, and discounting the period when the applicants were actively before this Court in the previous application, it is apparent that the delay was for a period of not more than two months. In *Cecilia Wanja Waweru v. Jackson Wainaina Muiruri & another* [2014] eKLR the Court pointed out that there is no timeline for applying for extension of time and each case should be considered on its own circumstances. Considering the applicant's uncontroverted averment that the impugned judgment was delivered in their absence, a delay of less than two months cannot be said to be inordinate. As such, I find the applicants' explanation to be sufficient to warrant the exercise of my discretion to enlarge time in their favour.
10. The other consideration is whether the respondents stand to suffer prejudice if the present application is allowed. As this application was not opposed, the respondents have thus not laid any arguments before the Court to counter the applicants' request to be permitted to enjoy their right of appeal. I therefore find no perceived or actual prejudice that will be suffered by the respondents if time is enlarged to allow the applicants to ventilate their grievances before the Court.
11. In conclusion, the notice of motion dated 17th May 2024 has merit and is hereby allowed in the following terms:
 - i. That the applicants' Notice of Appeal dated 9th May 2024 is deemed as properly filed. The same to be served upon the respondents in accordance with the rules of this Court.
 - ii. The time for all the other activities consequent to the filing of a Notice of Appeal shall be as per the rules of the Court and time will run from the date of this ruling.
 - iii. The costs of this application shall abide the outcome of the intended appeal.
12. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JULY, 2024

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

